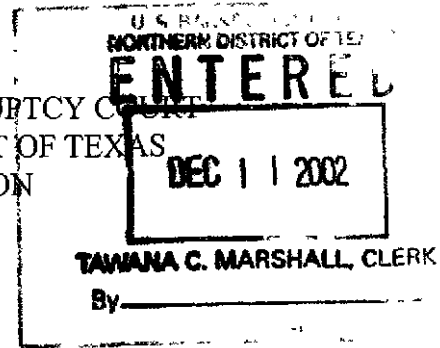


IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION



IN RE: §
§
THE ACADEMY AT WATERCHASE, LTD. §
Debtor. § CASE NO. 02-42443-DML-11
§

BNY MIDWEST TRUST CO., TRUSTEE, §
PMC JOINT VENTURE, L.P. 2000, §
Plaintiffs, §
§
vs. § ADV. NO. 02-4169
§
TRACY C. N. WOOD, WILLIAM KEITH, § Removed Proceedings:
JBT SQUARED, INC., TODD COWAN § Case No. 02-00921-E
AND JOANN KNEER, § (Dallas Co. Ct. at Law No. 5)
Defendants. §

MEMORANDUM OPINION AND ORDER

Before the court are the motions for partial summary judgment filed by Plaintiffs (individually “BNY” and “PMC”) against, respectively, Defendant Todd Cowan (“Cowan”) and Tracy Wood (“Wood”; collectively with Cowan, “Defendants”) (the “Motions” or, respectively the “Cowan Motion” and the “Wood Motion”)¹. The Court heard oral argument on the Motions on December 4, 2002, and, in addition to briefs filed by the parties in advance of argument, Plaintiffs supplied the court thereafter with copies of additional authorities. This matter was removed to this court (28 U.S.C. § 1452; Fed. R. Bankr. P. 9027) and the court exercises jurisdiction pursuant to 28 U.S.C. § 1334(b). At oral argument, the court understood the parties

¹ There are other defendants in this adversary proceeding who were not involved with the Motions and several of whom have already been the subject of default summary judgments.

to consent to entry by this court of final judgment in this case.² Accordingly, the court is considering this adversary proceeding as within its jurisdiction. 28 U.S.C. § 157(c)(2).³

I. Background

This adversary proceeding involves pursuit by Plaintiffs of Defendants for recovery on Defendants' guaranties of debt of the captioned debtor ("Debtor"). In the Cowan Motion, Plaintiffs ask that the court reform a deed of trust pertaining to 1.27 acres of land in Tarrant County, Texas (the "1.27 Tract" and the "1.27 Tract Deed of Trust") and that the court grant judgment against Cowan for approximately \$2,700,000⁴ by reason of his guaranty. The Wood Motion seeks judgment against Wood in like amount on her guaranty.

The underlying dispute on which the adversary proceeding is based arises from a loan by Plaintiffs' predecessor in interest to Debtor in April 1998. Debtor at that time operated a golf facility on approximately 59 acres in Tarrant County. The loan to Debtor was secured by that property and was further supported by various personal guaranties, including those of Cowan and Wood. At all times pertinent to this case, Cowan and Wood were (and apparently remain) married.

Subsequently the loan to Debtor went into default. In July 2001, PMC gave notice to Debtor of default and, in August, of acceleration of Debtor's obligations. After a hiatus of over

² Plaintiffs and Defendants have also taken actions that could imply consent to this court's jurisdiction – e.g., the filing of the Motions. The court had a concern about entering partial summary judgment – an interlocutory order – in a case another court might ultimately hear.

³ The court recognizes other parties to the litigation may not have consented. However, based on its understanding of the facts, the court anticipates those persons will not be active in the case.

⁴ The amount sought includes attorneys' fees, default interest and a prepayment penalty. Because the court decides the Motions as it does, it need not reach the question of the total owed to Plaintiffs.

six months, on March 1, 2002, PMC entered into a forbearance agreement (the "Agreement") with Debtor and all the guarantors.

It is the Agreement that has led to the instant dispute. Prior to the Agreement, the 1.27 Tract was owned by an entity that had agreed to convey that property to Cowan. The 1.27 Tract occupies a critical location in connection with the operation of Debtor's business. Debtor had hitherto used the 1.27 Tract at its owner's sufferance, but PMC wished to protect further its position by obtaining a lien on the 1.27 Tract.

As a result, the Agreement required Cowan to obtain title to the 1.27 Tract and execute the 1.27 Tract Deed of Trust. Cowan did this. Wood, however, was not a grantee on the deed. As acknowledged by Cowan, though, he took title to the 1.27 Tract as community property. Wood did not execute the 1.27 Tract Deed of Trust.

Counsel for PMC, in drafting the 1.27 Tract Deed of Trust, included ¶ 5.13⁵ which appeared to exculpate Cowan from liability to Plaintiffs. Indeed, at oral argument Plaintiffs admitted that, if the court did not reform the 1.27 Tract Deed of Trust to eliminate ¶ 5.13, Cowan's liability, including his guaranty, would be extinguished.

PMC, however, contends that the inclusion of ¶ 5.13 in the 1.27 Tract Deed of Trust was a "mutual" mistake. In support, PMC has submitted the affidavit of Robert G. Buchanan, Jr.

⁵ ¶ 5.13 provides as follows

Notwithstanding anything contained herein or in the Note, in any action or proceeding brought on the Note or this Deed of trust, no personal liability shall be claimed or asserted against the grantor; provided, however, that nothing in the provisions of this section shall be deemed to limit or impair the enforcement against the Property or the Beneficiary's rights, remedies and recourse under any provision of the Note or this Deed of Trust with respect to the Property.

("Buchanan"), counsel to PMC and drafter of the 1.27 Tract Deed of Trust, admitting that he was mistaken in including ¶ 5.13. PMC also submits the affidavit of Tom Cantrell ("Cantrell") which purports to show that no release of Cowan or anyone else was discussed or contemplated in the time leading up to the Agreement. Finally, PMC argues that the terms of the Agreement are not consistent with ¶ 5.13 of the 1.27 Tract Deed of Trust, thus proving the paragraph was indeed mistakenly included in the document.

Cowan, on the other hand, indicated in his affidavit that he was counting on a release of his liability and would not have executed the 1.27 Tract Deed of Trust if he were not to be released. Moreover, Cowan, joined by Wood, argues that ¶ 5.13's exculpation should have been extended to Wood. Finally, Cowan urges that summary judgment may not be granted to Plaintiffs on his guaranty because Plaintiffs do not seek recovery on it in the adversary proceeding.⁶

I. Discussion

A. Standard for Summary Judgment

Summary judgment is proper when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law.⁷ It is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," when viewed in the light most favorable to the non-moving party, "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter

⁶ Plaintiffs non-suited Cowan prior to removal of this case to this court. He was subsequently brought back into the case via a third-party complaint by Wood and Plaintiffs' cross claim seeking reformation.

⁷ FED.R CIV.P 56(c). Jenkins v. Chase Home Mortg. Corp , 81 F.3d 592, 595 (5th Cir 1996).

of law."⁸ Summary judgment is inappropriate when conflicting inferences and interpretations may be drawn from the evidence.⁹ A dispute about a material fact is "genuine" if the evidence is such that a reasonable jury could return a verdict for the non-moving party.¹⁰

B. Reformation of the Agreement

Plaintiffs argue that the Agreement should be reformed to exclude ¶ 5.13. They assert that Buchanan's and Cantrell's affidavits make it clear that it was included in the 1.27 Tract Deed of Trust through mutual mistake. Cowan's affidavit, they argue, does not directly contradict the affidavits presented by Plaintiffs. Moreover, the offending provision clearly was not part of the Agreement.

The court cannot agree. The 1.27 Tract Deed of Trust is sufficient on its face to raise a material issue of fact as to whether its ¶ 5.13 represents the agreement of the parties or a mistake. *See Meza v. General Batter Corporation*, 908 F. 2d 1262 (5th Cir. 1990).

Furthermore, Cowan's affidavit sufficiently contradicts those of Buchanan and Cantrell to leave the court uncertain that ¶ 5.13 represents or does not represent the intent of the parties. Cowan suggests it was a mistake that ¶ 5.13 did not include a release of Wood. That contention by Cowan casts a shadow over his affidavit. If release of liability was the intent of the parties, it would be logical for Cowan to focus on the release. Had he done so, he surely would have noted

8 Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986).

9 Askanase v. Fatjo, 130 F.3d 657, 665 (5th Cir. 1997), James v. Sadler, 909 F.2d 834, 836-37 (5th Cir.1990).

10 Anderson, 477 U.S. at 247.

the failure to include Wood in ¶ 5.13. Thus, his assertion that reformation of the 1.27 Tract Deed of Trust is necessary to exculpate Wood raise credibility issues concerning his affidavit.

Nevertheless, the court's concerns in this regard are insufficient to eliminate doubt about the intent of the parties. This is especially true since the Agreement – if it ever was, in fact, an enforceable agreement – does not, as Plaintiffs suggest, demonstrate an intent inconsistent with ¶ 5.13 of the 1.27 Tract Deed of Trust. The Agreement is brief and does not address the release of or continuation of Cowan's or Wood's liability. As such it lacks the probative effect Plaintiffs would accord it.

In sum, the court cannot at this time conclude the 1.27 Tract Deed of Trust should be reformed. There are clearly material issues of fact that must be addressed before it could so rule. To the extent the Cowan Motion seeks this relief, it must be DENIED.

C. The Guaranties

1. Cowan

Because the court must deny reformation of the 1.27 Tract Deed of Trust on a summary judgment basis, it follows that Cowan's liability to Plaintiffs is an open issue. The court therefore need not reach the question of whether Cowan's liability on his guaranty is actually before it. Hence, the Cowan Motion, as to Cowan's liability on his guaranty, must also be DENIED.

2. Wood

Wood presents a closer question. Wood's case depends on Cowan's position that the 1.27 Tract Deed of Trust was supposed to release Wood as well as Cowan. Yet accepting this as

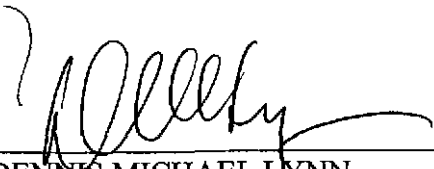
fact while relying on the terms of the 1.27 Tract Deed of Trust as contradicting Plaintiffs' summary judgment evidence gives the court some concern.

On the other hand, Cowan and Wood were married at the time of the Agreement and the execution of the 1.27 Tract Deed of Trust. The 1.27 Tract was community property. It would not make sense to encumber the 1.27 Tract to obtain a release for Cowan but not Wood (it is unclear what liability Cowan would retain as a member of the community with Wood in such a situation). Given that Wood's pleadings are filed subject to Fed. R. Bankr. P. 9011, the court recognizes that the contentions made by Wood, if patently false, would subject her and her counsel to sanctions. Considering the marriage of Wood and Cowan and the implications of Rule 9011, the court concludes Cowan's affidavit is enough to raise a question about Wood's liability. Certainly, given the penalties Cowan might incur through making a false affidavit, the court at this time is not prepared to adopt the inferences necessary to grant summary judgment on Wood's guaranty. The Wood Motion is thus DENIED.

III. Order

For the reasons stated above, the Motions are hereby in all respects DENIED.

Signed this the 11th day of December 2002.



DENNIS MICHAEL LYNN,
UNITED STATES BANKRUPTCY JUDGE